United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

139

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 24,431

UNITED STATES OF AMERICA
Appellee

v.

JOSE DIXON
Appellant

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

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CASES CITED

B R I E F F O R A P P E L L A N T

Statement of Question Presented

1. Whether the trial judge, as a part of his instructions to the jury, may charge the jury that an essential element of fact of the crime charged has been proven.

[This case has not been heard by this Court]

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Appellant

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the United States District Court for the District of Columbia. Jurisdiction of this cause is had by this Court pursuant to Title 28, §1291, United States Code, as amended. Leave to prosecute in forma pauperis was granted by order of the United States District Court for the District of Columbia as contained in the original record on appeal which was docketed in this Court.

REFERENCES TO RULINGS

Appellant was tried in the United States District Court for the District of Columbia, before a jury, the Honorable John H. Pratt, judge, Criminal No. 1933-'69, along with co-defendants Larry Gant and Roosevelt Scarborough, Jr. All were convicted. Larry Gant did not appeal. Roosevelt Scarborough, Jr. did appeal, No. 24,430, and pursuant to the government's unapposed motion this Court by Order entered December 3, 1970 consolidated the appeals of Scarborough, No. 24,430, and Dixon, No. 24,431.

At page 386 of the trial transcript the trial judge ruled the objects (pocketbooks) of the alleged burglary and larceny were in the possession of the complaining witness.

STATEMENT OF THE CASE

Appellant, Jose Dixon, age 17, was indicted and charged with Burglary (§22-1801(a), D.C. Code) and Petit Larceny (§22-2202, D. C. Code). Pleaded not guilty, tried by jury and found guilty April 10, 1970. Trial Court on June 11, 1970 suspended the imposition of sentence and placed appellant on probation for a period of 3 years. Appellant is now residing at his home in the District of Columbia.

Trial Proceedings
The Government's Case

Mrs. Sarah C. Robinson testified that she was sleeping in her lighted bedroom when awakened by 5 boys in the room. She recognized them, including appellant, as boys who resided in the neighborhood. She saw them leave and 2 pockebooks she had on her dresser were missing and later found some distance from her apartment. She reported the matter to the police, and caused a warrant to be issued for appellant's arrest.

Trial Proceedings
The Defense

Appellant took the stand and denied any entry into

Mrs. Robinson's bedroom or taking of pocketbooks, and that he was engaged in other activities at his home at the time of the alleged crimes. His sister and mother testified to their belief that this was true.

Discussion

The efforts of the defense were hampered in presenting a closely knowledgeable alibi defense for the reason that several weeks elapsed between the time of the alleged crimes and arrest of appellant, obscuring exact time recall.

The Trial Court's Instructions To The Jury

"To establish the first element, the property must have been taken from the possession of the complainant.

The law recognizes two kinds of possession, actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it. A person who knowingly has the power and intention, at a given time, to exercise dominion or control over a thing, either directly or in concert with another person, is then in constructive possession of it.

I charge you that the pocketbooks in Mrs. Robinson's bedroom were in her possession." (Tr. 386)

STATEMENT OF POINTS

1. The trial court erred in charging the jury that the pocketbooks were in the possession of the complaining witness and thus usurping the fact finding function of the jury to determine whether the essential element of the crime of larceny had been proven by the government beyond a reasonable doubt.

STATUTES INVOLVED

The pertinent statutes involved in this appeal include the criminal trial by jury clause 3, Section 2, Article III of, the due process clause of the Fifth Amendment and the impartial jury clause of the Sixth Amendment to, The Constitution of the United States of America.

SUMMARY OF ARGUMENT

In the framework of this case, one of the essential elements of the offense of larceny which the government had the burden of proving beyond a reasonable doubt was the fact that the pocketbooks were in the possession of

the complaining witness.

It is the function of the Court to instruct the jury as to the law of the case and advise the jury upon the facts.

But it is the exclusive function of the jury to determine the facts!

The right of a person accused of crime to have the facts, presented at his trial, judged solely by an impartial jury, is guaranteed by the Sixth Amendment to The Constitution of the United States. And includes the right to be free of unfair comment from the Court as to what essential facts were proved.

And certainly includes the right to be free from a ruling of the Court binding them to determine an essential element of fact against the interest of the jury.

Charging the jury that an essential element of the offense charged in the indictment on which he is being tried Has already been determined amounts to nothing more or less than partial trial by jury and partial trial by the Court, not an impartial jury trial.

To destroy the impartiality of the jury by such direct intervention is plain error requiring reversal.

ARGUMENT

The trial Court's charge that the pocketbooks were in the possession of the complainant decided this essential fact for the jury and amounted to an instructed verdict on that point of fact and denied appellant a trial by an impartial jury and due process under the Fifth and Sixth Amendments to the Constitution.

(With respect to this point, appellant desires the Court to read pages 386, 389, 390, of the reporter's transcript)

"The difference between assisting the jury, which is a duty of a federal judge, and encroaching upon its responsibilities, which is forbidden, has been developed at great length many times, as we have pointed out. When a federal judge comments upon evidence by expressing his opinion upon phases of it, he is treading close to the line which divides proper judicial action from the field which is exclusively the jury's. Therefore he must make it unequivocally clear to the jurors that conclusions upon such matters are theirs, not his, to make; and he must do so in such manner and at such time that the jury will not be left in doubt; reference in some remote or obscure portion of a long charge will not suffice for the purpose." Billeci v. U.S., 87 U.S. App. D.C. 274, 283; 184 F.2d 394.

"***A federal judge may analyze the evidence, comment upon it, and express his views with regard to the testimony of witnesses. He may advise the jury in respect of the facts, but the decision of issues of fact must be fairly left to the jury...." U.S. v. Murdock, 290 U.S. 389, 394; 78 L.ed. 381; 54 S.Ct. 223.

"***The judge may not, however, usurp the functions of the jury; and if his instructions may fairly be said to have been coercive upon the jurors in their consideration of facts determinative of their conclusion upon the question of guilt, the charge is erroneous, even though in form it is an expression of the court's opinion and the jurors are told that, after all, they are to determine the facts." Quercia v. U.S., 289 U.S. 466, 467; 77 L.ed. 1321; 53 S.Ct. 698.

In the case at hand there was no mere flirtation with transgressing the jury's field, advice upon the facts, but rather a deep plowing of the jury's land and an order that there was nothing left for the jury to consider on the issue of possession. Coercive, indeed, to the utmost power of the trial court to instruct on the matter of possession.

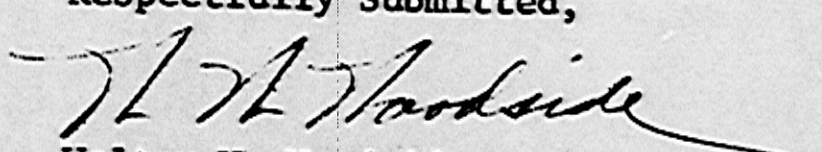
The Sixth Circuit decided, in a negligence case, that whether or not the injured plaintiff was a licensee or invitee was a question of fact for the jury, and the court expressed the opinion that the evidence showed him to be a licensee, accompanied by a warning that it was an issue to be resolved by the jury, none the less was an opinion on an ultimate fact question peculiarly for jury consideration and amounted to an instructed verdict as to the defendant, and hence reversible error. Nunley v. Pettway Oil Company, 346 F.2d 95 (1965).

The trial court, in the instant case, clearly instructed the jury that proof of possession of the larcenous object was an essential element in their consideration of the guilt of the defendant as charged. Then took from the jury this essential element of its function in complete derogation of appellant's right to have all issues of fact decided by the jury, and despite objection by counsel (Tr. 389), still left the matter as a direction for the jury to so decide (Tr. 390). This is reversible error, and not made harmless, whether or not it had substantial influence on the jury's verdict. U.S. v. Hayward, 136 U.S. App. D.C. 300, 420 F.2d 142.

CONCLUSION

The failure to allow all issues of fact to be determined by the jury amounted to grievous error in appellant's trial for which the intervention of this Court is required to give proper redress, and the Court is urged to reverse and direct a proceeding to give appellant a fair and impartial trial by jury, which, up to now, he has been denied.

Respectfully Submitted,



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